

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL

77-4001

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SCIENTIFIC PEST CONTROL CORPORATION; LOCAL 522, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT LOCAL 522, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

CHARLES R. KATZ, Esq.
Attorney for Local 522
360 Lexington Avenue
New York, New York 10017
Tel. No. (212) 867-9140

RICHARD M. GREENSPAN, Esq.
On the Brief



INDEX

	Page
Statement of Issues Presented	1
The Facts	2
The Board's Order	4
Argument	5
<u>Point I</u>	5
The Record Herein Is Devoid of Any Evidence Demonstrating Local 522 Accepted Recognition And Entered Into A Collective Bargaining Agree- ment with Knowledge of Organizational Activity Of Local 155 or the Employer's Alleged Unlawful Conduct with Respect to Local 155	
A. The Employees Were Organized by Local 522	5
B. Organizational Activity by Local 155	5
C. Local 155 Never Had a Majority of the Employees .	6
<u>Point II</u>	7
Local 522 Represented a Majority of Employees In an Appropriate Unit And Its Recognition Agreement And Contract Were Lawful.	
<u>Point III</u>	8
The Remedy of the Reimbursement Of Dues Should Not Be Ordered.	
Conclusion	9

AUTHORITIES CITED

Cases:

Page

Brown-Olds Plumbing & Heating Corp., 115 NLRB 594	8
Carpenters Local 60 v. NLRB, 365 US 651 (1961)	8
Cherrin Corp. v. NLRB, 349 F.2d 1001 (6 Cir. 1965)	6
H.A.M.L. v. NLRB, 499 F.2d 78 (3 Cir. 1974), cert.denied 419 U.S.1089.	8
Hughes & Hatcher Inc. v. NLRB, 393 F.2d 557 (6 Cir. 1968) .	9
Lakeland Bus Lines, Inc. v. NLRB, 278 F.2d 888 (3 Cir.1960) .	8
NLRB v. American Dredging Co., 276 F.2d 286 (3 Cir.1969) . . .	9
NLRB v. Burke Oldsmobile, Inc., 288 F.2d 14 (2 Cir.1961) . .	8
NLRB v. Peter Paul, Inc., 467 F.2d 700 (9 Cir.1972)	8
NLRB v. United States Steel Corp., 278 F.2d 896 (3 Cir.1960).	8
Playskool, Inc. v. NLRB 477 F.2d 66 (7 Cir. 1973);	8
Virginia Electric Co. v. NLRB, 319 U.S.533 (1943)	8

Statutes:

National Labor Relations Act as amended (61 Stat. 136
73 Stat. 519, 88 Stat 395, 29 U.S.C., Sec. 151, et. seq.)

Section 8(a) (1)	1,4
Section 8(a) (2)	2
Section 8(a) (3)	1,2,4
Section 8(a) (5)	1
Section 8(b) (1) (A)	2,4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4001

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SCIENTIFIC PEST CONTROL CORPORATION, LOCAL 522,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR LOCAL 522
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFERS, WAREHOUSEMEN AND HELPEFS OF AMERICA

STATEMENT OF ISSUES PRESENTED:

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee William Raupp and then, after reinstating him, by reducing his pay, eliminating certain benefits, and curtailing his work schedule.
2. Whether substantial evidence on the record as a whole supports the Board's finding that Local 155 represented an uncoerced majority of the employees and that the Company therefore violated Section 8(a)(5) and (1) of the Act by both refusing to bargain with Local 155 and engaging in misconduct which prevented the holding of a fair election.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Sections 8(a)(1), (2) and (3) of the Act by recognizing Teamsters Local 522 as the collective bargaining representative of its employees at a time when that union did not represent an uncoerced majority of its employees and by thereafter entering into and enforcing a collective bargaining contract with Teamsters Local 522; whether substantial evidence on the record as a whole supports the Board's finding that Teamster Local 522 violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition as the collective bargaining representative of the Company's employees and further by entering into and enforcing a collective bargaining contract with the Company.

THE FACTS

On September 9, 1974 Local 155 made a bargaining demand upon the Employer in a unit of 15 employees. (A. 356,29) At the time of such demand the number of employees in the unit in fact were 18, fifteen employees appearing in G.C. Exhibit 15 (A 415), some of which were part-time employees (A 242) and Frank Baudo a part-time employee. Baudo started working for the Employer in 1971 on a part-time basis (A 244). In 1974 Baudo commenced part time work on September 11, 1974. (A 246,247) The addition of Mark and Joseph Giardano make a total of 18 in the unit.

The majority status of Local 155 consisted of nine (9) cards. (A 414) One of these cards, that of Patrick Tierney, was never signed by Tierney, and he denied the signature on the card was his. (A 229) Another of these cards, that of Mark Mintner, resigned his employment, in writing, effective September 9, 1976. (A 93) Another of these cards, that of Ronald Page, had also signed a card

for Local 522 (Respondent Union Local 522's Exhibit I(b) and must be disregarded toward the Local 155 majority status. The valid designation cards of Local 155 were thereby reduced to only six.

On September 9, 1974 Sam Casalino, Business Agent of Local 522 was called by employee James Melville. Casalino asked if there was a union in the shop and Melville said "No". They arranged to meet the following day and Casalino took authorization cards with him and met Melville outside the Company's premises. Casalino gave Melville the cards and explained the procedure of organizing and told Melville when he had the cards to notify him and he would pick them up. (A 360) On September 11, 1974 Melville called him and on September 12, 1974 Casalino arranged to meet Melville before work started. (A 360)

On September 12, 1974 Casalino had 11 authorization cards (Respondent Union's Exhibit 1A-1L; A 100) in an appropriate unit of 14 employees. (A 361) He showed Giordano the cards and Giordano signed a Recognition Agreement with Respondent Local 522. On September 13, 1974 Casalino and Giardano went over a sample contract and they signed a Memorandum of Agreement on the contract terms. The handwritten memorandum was put into legal language and a typed form was signed by Giordano on September 16, 1974, effective from September 13, 1974. (A 360)

On Monday, September 18, 1974 Casalino explained the terms of the Agreement to the employees (A 362) and explained that those employees who had not joined the Union had 30 days to do so or be subject to discharge. (A 362) On October 18, 1974 Respondent Local Union 522 wrote Giordano requesting the termination of Raupp, Balz and

De Meo on October 21, 1974, unless they complied with the Union security clause of the Agreement. (A 362)

There was no proof adduced at the hearing that Local 522 was aware of any organizational activities of Local 155 and no findings of that fact were made.

THE BOARD'S ORDER

The Board found the Company to have violated Sec. 8(a) (1) and (3) of the Act by interrogating employees and discharging Raupp and reducing his pay. The Board found Local 522 to have violated Sec. 8(b) (1) (A) and (2) of the Act by demanding the discharge of Raupp and Balz. In addition, the Board found a violation of Sec. 8(a) (1), (2), (3) and (5) by refusing to recognize Local 155 and by recognizing Local 522 and thereafter entering into a contract with Local 522. In addition, Local 522 was found to have violated Sec. 8(b) (1) (A) and (2) of the Act by accepting recognition and entering into a collective bargaining agreement.

The Board's Order directed the Employer to cease and desist from the unfair labor practices found and from in any other manner, interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. (A 369-370) The Order also directed Local 522 to cease and desist from the unfair labor practices it was found to have committed. (A 372) Affirmatively, the Order required the Company to recognize and bargain with Local 155, to void the collective bargaining agreement and reimburse all present and former employees after the execution of the recognition agreement for monies paid by the employees or deducted from their earnings for initiation fees, dues assessments, or other obligations of membership

in Local 522, plus interest; offer Raupp and Balz reinstatement at the St. James location where they initially were employed; and jointly and severally, with Local 522, make them whole for any loss of earnings they may have suffered because of their October 18, 1974 discharge; and to post appropriate notices. (A 383,384,386, 370-371, 372)

ARGUMENT

POINT I

THE RECORD HEREIN IS DEVOID OF ANY EVIDENCE DEMONSTRATING LOCAL 522 ACCEPTED RECOGNITION AND ENTERED INTO A COLLECTIVE BARGAINING AGREEMENT WITH KNOWLEDGE OF ORGANIZATIONAL ACTIVITY OF LOCAL 155 OR THE EMPLOYER'S ALLEGED UNLAWFUL CONDUCT WITH RESPECT TO LOCAL 155.

A. The Employees Were Organized by Local 522

Local 522 undertook an organizational campaign at the Employer's facility. It was successful in getting more than a majority of the cards signed by employees in an appropriate bargaining unit, to wit: Drivers and Exterminators, Salesmen and General Helpers and Warehousemen. (A 417) The Union was duly accorded recognition and a collective bargaining agreement was negotiated.

At no time did Local 522 become aware that the Employer had refused to recognize Local 155 or that it engaged in alleged unlawful conduct towards Local 155 and its supporters.

B. Organizational Activity by Local 155

The record herein and the Board's decision makes no finding that Local 522 was aware of alleged organizational activity of Local 155. The fact is, even if such activity took place, it was ineffective and the employees decided to go with Local 522 by their own choosing. There is no finding nor can there be, that Local 522

was assisted by the Employer in obtaining its authorization cards from employees. Such knowledge should not be imputed to Local 522 because of alleged unlawful activities of the Employer. Local 522 was able to successfully organize the facility despite the Employer's alleged violations of the Act.

C. Local 155 Never Had a Majority of the Employees

- 1) Mark Giordano and Joseph Giordano Should Have Been Included in the Unit.

The total unit for counting Local 155's majority should have been 18 employees. The testimony revealed these employees worked each Saturday and in addition, worked on holidays and on other occasions. They cleaned offices, trucks and equipment which was bargaining unit work performed by other employees in the unit. They worked regularly on Saturdays and are regular part-time employees. It was error to exclude them solely because they are the children of the corporation's stockholder.

In Cherrin Corp. v. NLRB, 349 F.2d 1001 (6th Cir. 1965), the Circuit Court of Appeals in enforcing the Board's Order (147 NLRB No. 63), held the family relationship is not sufficient to exclude an individual from a unit of corporate employees; his family relationship is grounds for exclusion only if he enjoys a special status as a result of this relationship.

- 2) Frank Baudo Should Have Been Included in the Unit.

His exclusion by the Board is in error. Frank Baudo holds a full time position but has worked for the Respondent Company on a part time basis since 1969 and appeared on the payroll of the Company

for the work week ending September 17, 1974. He performed the same services as the other employees in the bargaining unit. He should have been included in the unit as a part-time employee, and the appropriate unit for testing the majority status of Local 155 should have been 18 employees.

Therefore, Local 155 never had a majority.

POINT II

LOCAL 522 REPRESENTED A MAJORITY OF
EMPLOYEES IN AN APPROPRIATE UNIT AND
ITS RECOGNITION AGREEMENT AND CONTRACT
WERE LAWFUL.

On September 9, 1974 Sam Casalino, Business Agent and Vice President of Local 522, was called by James Melville. He saw Melville on September 10, 1974 and gave him Local 522 authorization cards to have distributed to the employees. He picked up the cards from Melville on September 12, 1974 and seeing he had the majority, met with Mr. Giordano, showed him the authorization cards and after examining them, signed the Recognition Agreement with Local 522. On September 13, 1974 Casalino met again with Giordano and negotiated an agreement and they signed a Memorandum of Agreement on the contract terms. The handwritten agreement was then typed which was signed by Giordano on September 16, 1974, effective September 13, 1974. (A 19)

On September 12, 1974 Casalino showed Giordano the authorization cards signed by a majority of the employees in the bargaining unit, on September 12, 1974.

The appropriate unit on September 12, 1974 consisted of 14 employees.

Clearly, Respondent Union had a majority of the employees in the bargaining unit and the Employer's recognition of Local 522

and negotiation of an agreement was lawful.

Therefore, since Local 522 had a clear majority, without evidence of taint, no question concerning representation of the Employer's employees was raised by the unfair labor practices.

See: NLRB v. Peter Paul, Inc., 467 F.2d 700 (9 Cir. 1972);
Playskool, Inc. v NLRB, 477 F.2d 66 (7 Cir. 1973);
H.A.M.L. v. NLRB, 499 F.2d 78 (3 Cir. 1974), cert.denied
419 U.S. 1089.

POINT III

THE REMEDY OF REIMBURSEMENT OF DUES SHOULD NOT BE ORDERED

Since there was no evidence that the majority of the employees were forced to join Local 522, the remedy of reimbursement of dues and initiation fees is not appropriate.

In Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961) the Supreme Court indicated that where there has been no actual compulsion to join a union, even though there has been an unfair practice in the maintenance of an unlawful agreement, the imposition of this reimbursement remedy is punitive and beyond the power of the Board.^{1/} This limitation on the Board's Brown-Olds remedy (Brown-Olds Plumbing & Heating Corp., 115 NLRB 594) is applicable in this case.

See: NLRB v. Burke Oldsmobile, Inc., 288 F.2d 14
(2 Cir. 1961);

NLRB v. United States Steel Corp., 278 F.2d 896
(3 Cir. 1960);

Lakeland Bus Lines, Inc. v. NLRB, 278 F.2d 888
(3 Cir. 1960);

^{1/} Authority for imposition of this reimbursement remedy is originally found in Virginia Electric Co. v. NLRB, 319 U.S. 533 (1943).

NLRB v. American Dredging Co., 276 F.2d 286,
(3 Cir. 1969);

Hughes & Hatcher Inc. v. NLRB, 393 F.2d 557,
(6 Cir. 1968).

CONCLUSION

FOR THE FOREGOING REASONS, THE BOARD'S ORDER
SHOULD NOT BE ENFORCED AGAINST RESPONDENT
LOCAL 522, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA.

Dated: New York, New York
April 1977

Respectfully submitted,

CHARLES R. KATZ
Attorney for Respondent Local 522
360 Lexington Avenue
New York, New York 10017

Richard M. Greenspan, Esq.
On the Brief

United States Court of Appeals
for the Second Circuit

National Labor Relations Board,
Petitioner,

v.

Scientific Pest Control Corporation; Local 522,
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America,
Respondents.

**AFFIDAVIT
OF SERVICE
BY MAIL**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Antonio D. Ramos

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 10 Catherine Street, New York, New York
That on April 27, 1977, he served 3 copies of
on Brief

Samuel M. Kaynard, Esq.,
Regional Director,
National Labor Relations Board,
Region 29,
16 Court Street,
Brooklyn, New York, 11241.

by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this
27 day of April, 1977.

.....*Antonio D. Ramos*.....

John V. [Signature]
JOHN V. DESPOSINO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 31, 1979